

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CALVIN STEPHENS, STANLEY EDWARD	)	
HAYES, III; and all others	)	NO. CV-06-119-LRS
similarly situated,	)	
	)	<b>ORDER GRANTING DEFENDANTS'</b>
Plaintiffs,	)	<b>MOTION FOR SUMMARY JUDGMENT,</b>
	)	<b>DENYING PLAINTIFFS' MOTION FOR</b>
-vs-	)	<b>SUMMARY JUDGMENT AND DENYING</b>
	)	<b>PLAINTIFF'S MOTION TO CERTIFY</b>
CITY OF SPOKANE, and SPOKANIMAL	)	<b>CLASS</b>
C.A.R.E., a Washington Non-	)	
Profit Corporation,	)	
	)	
Defendants.	)	

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**BEFORE THIS COURT** at a scheduled hearing on October 10, 2007, are Defendants' motion to dismiss or grant summary judgment (**Ct. Rec. 24**), Plaintiffs' motion to certify class (**Ct. Rec. 31**), and Plaintiffs' motion for summary judgment re: vagueness, lack of probable cause and excessive fines (**Ct. Rec. 59**). Heath Irvine and Michael Kinkley appeared on behalf of the Plaintiffs; Ellen O'Hara represented Defendant City of Spokane and Carl Hueber represented Defendant Spokaneimal C.A.R.E. With the benefit of oral argument and detailed review of the pleadings and declarations, this order is intended to

1 memorialize and supplement the oral ruling of the Court on October 10,  
2 2007.

3 For the reasons stated on the record on October 10, 2007, all  
4 Defendants are entitled to summary judgment dismissal because there  
5 are no genuine issues of material fact, and Defendants are entitled to  
6 judgment as a matter of law.

7 **I. DISCUSSION:**

8 *A. Constitutionality of the Ordinance*

9  
10 Plaintiffs claim that they were each issued an infraction by  
11 animal control officers for violating the Spokane "barking dog"  
12 ordinance, which in their view is void for vagueness. Furthermore,  
13 Plaintiffs allege that such citations amount to violation of their  
14 Fifth and Fourteenth Amendment due process rights. Plaintiff Calvin  
15 Stephens who is African American also claims that his civil rights  
16 were violated because of his race.

17 The ordinance, SMC 10.03.060, provides in relevant part:

18 A. No person may allow an animal to unreasonably disturb  
19 persons by habitually barking, howling, yelping, whining, or  
20 making other oral noises.

21 B. A violation of this section is established if the person  
22 disturbed is either an animal control officer or an individual  
23 residing within three hundred feet (exclusive of public  
24 right-of-way) of the place where the animal is harbored.

25 ///  
26

1 C. A violation of this section is a class 1 civil infraction.

2 It is presumed that an ordinance is constitutional unless its  
3 unconstitutionality appears beyond a reasonable doubt, and the burden  
4 of proving an ordinance's vagueness rests with the party challenging  
5 its constitutionality. *American Dog Owners Assn. v. City of Yakima*,  
6 113 Wn.2d 213, 777 P.2d 1046 (1989). An ordinance is void for  
7 vagueness if it is framed in terms so vague that persons of common  
8 intelligence must necessarily guess at its meaning and differ as to  
9 its application. *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d  
10 142 (1988).

11  
12 Or stated more simply, in order to pass constitutional muster  
13 against a vagueness attack, a statute must give a person of ordinary  
14 intelligence adequate notice of the conduct it proscribes. *United*  
15 *States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829 (9th Cir. 1989).  
16 However, impossible standards of specificity are not required. *State*  
17 *v. Sullivan*, 143 Wn.2d 162, 184, (2001). A statute providing for civil  
18 sanctions is reviewed for vagueness with somewhat "greater tolerance"  
19 than one involving criminal penalties because the consequences of  
20 imprecision are less severe. *Conlan v. U.S. Department of Labor*, 76  
21 F.3d 271, 276 (9th Cir. 1996).

22  
23 Plaintiffs argue that this ordinance is unconstitutional and  
24 point out that the Washington State Supreme Court invalidated  
25 Spokane's previous dog barking ordinance. See *Fischer v. City of*  
26 *Spokane*, 110 Wn.2d 541 (1988). However, the *Fischer* case is easily

1 distinguishable from the case at bar. The ordinance in *Fischer* lacked  
2 a reasonableness standard and involved a criminal statute, not one  
3 that was civil in nature.

4 Plaintiffs also claim that issuing the citation was not  
5 reasonable because it was based on reports from the neighbors. But,  
6 as the municipal court found in a hearing regarding Mr. Stephens'  
7 citation, the ordinance has incorporated the reasonableness standard  
8 and is presumptively constitutional. This Court concurs. Section A  
9 of the ordinance clearly sets forth the reasonableness standard, which  
10 is to be evaluated by any animal control official. In the current  
11 ordinance, the citizen of average intellect need not guess at the  
12 prohibition of allowing an animal to unreasonably disturb persons by  
13 "habitually barking, howling, yelping, whining, or making other oral  
14 noises."  
15

16 *B. Claim of Racial Discrimination*

17 Mr. Stephens claim of racial discrimination also fails. In a §  
18 1981 action, the plaintiffs must show intentional discrimination on  
19 account of race. *Lowe v. City of Monrovia*, 775 F.2d 998, 1010 (9th  
20 Cir. 1986), as amended, 784 F.2d 1407 (9th Cir.1986); see also *General*  
21 *Bldg. Contractor Ass'n v. Pennsylvania*, 458 U.S. 375, 387-91, (1982).  
22

23 When the claim is for a discriminatory enforcement of a facially  
24 non-discriminatory ordinance the plaintiffs must show discriminatory  
25 intent. *Wayte v. U.S.*, 470 U.S. 598, 609-610 (1985). Mr. Stephens  
26 cannot show discriminatory intent on the part of any defendant. He

1 alleges that his neighbors may not have liked him because he is black,  
2 but that allegation is not directed at any defendant and fails to  
3 state a claim upon which relief may be granted.

4 *C. Plaintiff's Motion to Certify Class*

5 Fed. R. Civ. P. 23 states in relevant part:

6 "Prerequisites to a Class Action. One or more members of a  
7 class may sue or be sued as representative parties on behalf  
8 of all only if (1) the class is so numerous that joinder of  
9 all members is impracticable, (2) there are questions of law  
10 or fact common to the class, (3) the claims or defenses of  
11 the representative parties are typical of the claims or  
12 defenses of the class, and (4) the representative parties  
13 will fairly and adequately protect the interests of the  
14 class."  
15

16 Although it is not necessary for the Court to reach the issue of  
17 Plaintiffs' motion to certify class since it has granted Defendants'  
18 motion for summary judgment, it appears that the Plaintiffs in this  
19 case have failed to satisfy the requirements for class certification.  
20 Specifically, Plaintiffs have failed to satisfy the numerosity  
21 requirement, and the requirement that the claims or defenses of the  
22 representative parties are typical of the claims and defenses of the  
23 class since one representative paid a fine and the other one did not.  
24 For these reasons, Plaintiff's motion to certify class is **DENIED**.

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